

US EPA ARCHIVE DOCUMENT

# Enforcement Options

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Intro Ken

Give some idea of why this is important-context

Ken does 1-5

## Enforcement Options Overview

- Promoting “Enforcement First” policy
- Discuss options for enforcement
- Discuss forms and terms of settlement
- Discuss principal settlement tools and inducements
- Litigation

## Enforcement First

- “Enforcement First” Policy issued in 1989
  - Initiative to ensure that viable PRPs are held responsible for cleaning up sites– “polluters pay”
  - Reaffirmed in Suarez/Horinko memo, September 20,2002
- Consistent with overall enforcement goals
  - Ensure appropriate response by PRPs
  - Recover EPA costs
  - Fairness and equity for settling parties

## Why Settle?

- Advantages to all parties
  - U.S. Government
  - Settling parties (PRPs)
- See June 17, 1999 EPA Memo for Strategies for Encouraging Parties to Settle With EPA (good laundry list of potential inducements)

## General Settlement Principles

- EPA should seek to recover all costs
- Work agreements with PRPs who are technically and financially competent
- No admission of liability required
- No Imminent and Substantial Endangerment finding required
- Covenant not to sue and contribution protection are settlement incentives

## Settlement Documents: Administrative Orders on Consent

- CERCLA §§104, 106, 122 provide authority
- AOC documents agreements to perform removal, remedial investigation/ feasibility study (RI/FS) and remedial designs (RD)
  - Models for all forms of settlements available at [intranet.epa.gov/eoca/osre](http://intranet.epa.gov/eoca/osre)
  - No court approval requirement
  - Usually, DOJ is not involved
    - Exception: compromising certain costs pursuant to § 122(h)

First we're going to discuss the documents we use to settle and the process of getting there

These are administrative settlements – AOCs and judicial settlements – CDs

Requirement of the statute that RA be settled in the form of a CD

We are talking about work settlements that may or may not have an element of cost recovery- but we will talk about cost recovery specifically on Thursday

Where is our authority, , what is the policy and guidance, what are the common terms, issues and where do you find a model

## Settlements Documents: AOCs (Cont.)

- EPA model AOC for removal (July 9, 2001)
  - Appropriate for time-critical and non-time-critical removals
- EPA Model AOC for RI/FS (Revised Model RI/FS AOC, January 21, 2004)

Web site-hand out magnets

There is a model for almost every conceivable form of settlement from a removal to RI/FS to ATP to de minimis and several versions of each.



## Settlement Documents: Consent Decree (CD)

- CERCLA 122(d)- authority to enter into Consent Decree (CD)
- Agreement to perform Remedial Action (RA) must be contained in CD
- CD must be approved by federal court

Remember this requires that a complaint be filed in federal court

So you must do a referral

Who has done a referral?

Kinds of things in a referral

Liability analysis for each PRP

Site history

Characterization of site

Process to get this far, including Admin record

Evidence & witnesses

Cost documentation, if appropriate

Prereferral process-way to get a site to DOJ asking for pre-negotiation, consistent with Section 122; start thinking now how the negotiation process is codified by 122—more later for removal, RI/FS, RD/RA in those sections of the course

Approval standards: substantive and procedural fairness, reasonable, consistent with the goals of CERCLA—will be a somewhat case specific analysis done to fairness under the circumstances of that case.; lots of case law

## Settlement Documents: CD (Cont.)

- Policies and issues related to RD/RA CD:
  - June 2001 Revised Model RD/RA CD  
(revised May 2000 model to include latest provisions when there are federal PRPs)
  - Defining “matters addressed” (March 1997)
  - “Roles Memo” and its many revisions

Gen info re model CD: must get to know, read the provisions in relation to one another as they are complimentary; it's a good document; we have had lots of experience with it; because it is a standard document, you will get standard objections from the defense bar—things they don't like, like financial assurance, work takeover, what is force majeure?, when do penalties attach for submitting bad quality documents. All these things are in the model

First plug for team work, bonding—Steve and Steve examples

Matters addressed—what are the Defendants doing pursuant to this CD?

Work (Injunctive relief) and paying some form of costs) this is matters addressed and what they will get a covenant for as well as contribution protection ; this is an example of how the various provisions work together to give a good deal

More later on the significance of contribution and issues raised by the Cooper v. Aviall decision

Roles Memo—who in HQ has to concur, sign, give permission

Ken how do you get this? Send a writing to HQ called a PWA

## “Contribution Protection” in CD

- CERCLA 113(f)
- Protection given to PRPs who resolve their CERCLA liability to U.S.
- Protects settlers from claims by other PRPs for “matters addressed” in the settlement

What this means of course is that the settlers cannot be sued by another party for what they do under the CD. You would think that would be understood and accepted but you would actually be surprised by the litigation where one party is suing another in spite of the contribution protection.

This is not the issue it used to be since we started defining matters addressed so many years ago. This is important because it gives the settler repose and finality.

The issue now is when does a settler get the right of contribution for the work performed and it is not an issue for a CD but for an AOC but Ken will address this later in this module. You will become very familiar with what 113 (f) says and how you should read in along with other sections of the statute.

## “Covenant Not to Sue” (CNTS) in CD

- CERCLA 122(f)
- Promise given by U.S. to settling PRP only if:
  - CNTS is in the public interest
  - CNTS will expedite response action
  - Settlor is in compliance with CD
  - EPA has approved response action
- Effect is mitigated by reservations and reopeners

You may be compromising certain costs, or carving out work for others to perform but the settler will get a covenant for that compromise; another part of repose and finality

The four bullets are statutory requirements in 122; the model recites that these are the conditions for CNTS so what if the defendant is out of compliance?

Issues arise with CNTS for future liability, and how broad a covenant they are entitled to for what they are doing. 122(f) 1-6; see f (4)-factors

Must be read along with the reservations and reopeners: what is not covered; under what circumstances can we reopen—new information and how that is defined

Reopener as opposed to the need to refile

## CNTS by PRPs to Federal Government

- Generally, PRPs agree not to sue U.S. regarding:
  - EPA's response action decisions
  - Claims for reimbursement from Superfund Trust Fund [§ 106(b)(2)]
  - Cost recovery and contribution claims [§113 and §107]

This is what we get in return

We get repose from potential actions v. the government by the settlers.

They can't sue us on our response action decisions. Query when they could in view of 113 bar on pre-enforcement review but this is helpful?

Waive 106(b) reimbursement

Waive claims v. US-really important when there is a fed PRP

## Superfund Alternative Sites

- NPL eligible but not listed
- Require long term response
- Have viable PRPs
- Notify state
- Follows NCP remedial process
- Settlement agreement with PRPs requires special provisions

KEN

## Common Settlement Tools

- Mixed Funding
  - Three types:
    - Preauthorization
    - Mixed work
    - Cash-outs

Mixed funding is authorized by section 122(b)(1)

Example of mixed work and cash out-save pre-authorization for next slide

Will be embodied in the terms of the CD (or AOC) For instance we are doing part of the work but they get a covenant for all the work.

They are cashing out, but not paying all costs because we have another PRP or 2 to pursue but they get a covenant for all the costs.

## Common Settlement Tools

- Mixed Funding
  - EPA pays portion of non-settlers' cleanup costs either through actual payment or performance of work and subsequently seeks cost recovery from viable non-settlers
  - Appropriate for any multiparty site where only some PRPs willing to settle
  - “Evaluating Mixed Funding Settlements Under CERCLA” (Oct. 20, 1987)

Practicality of this mechanism:

Must first determine if there is money available for pre-authorization-call Mike Northridge; has to meet qualification, mainly, the settlers equitably should not have to pay all of the costs associated with the site cleanup and has to be a work agreement. O/O sites where divisibility is a factor (due to term of ownership as a measure) are likely candidates.

Talked about Roles memo-here is where you would have to do a PWA-setting out facts and circumstances that make this a site where we would want to do preauthorization.. Requires very specific language in CD regarding terms and claims procedure.

Example: Armour Road Pesticide mfg site in a commercial area of KC; RR along side with some potential liability because they delivered stuff to site and responsible for spills & 6 million removal to excavate, treat and dispose of contaminated soil. In contribution litigation over allocation

3 O/Os and successors (many issues on successor liability)

A = 35 years bankrupt

B = 7 years willing to do work if some compromise by gov't

C = present owner but no disposal

Peripheral parties with some liability

Terms of settlement



## Common Settlement Tools

- Orphan Share Compensation
  - EPA policy: EPA may compensate settling parties for a part of the “orphan” share
  - “Orphan” = insolvent/ defunct PRPs’ share
  - Part or all of past costs or future oversight costs are compromised as compensation

On previous slide we discussed how mixed funding might be especially appropriate for O/O sites where there is a divisibility issue; Where mixed funding is statutory, orphan share compensation, is by guidance and is not appropriate for O/O sites but for generator sites where EPA is willing to forgive some or all past and future oversight costs in order to get a work agreement from the parties

We just talked about this but keep it in mind as an important settlement tool.

## Common Settlement Tools

- Special accounts
  - EPA receives funds as part of settlement
  - Placed in site-specific account
  - Used by EPA at a specific site
  - Interest bearing
  - May also be disbursed to settling PRPs as part of a settlement at the same site
  - Heightened scrutiny regarding use/retention of special account funds

Now here's one that is getting lots of attention from Congress, IG, GAO, PRPs; everyone wants us to spend the money in the special accounts-so what is a special account that is getting so much scrutiny.

Is essentially the proceed from some form of recovery –de minimis recovery, bankruptcy recovery , cashout, put into the fund in a special account that is site specific.

Can be used to fund work at the site, either by EPA or by allowing PRPs to have \$ out of special account pursuant to terms of a settlement agreement.

There is a ton of guidance on this.

Questions: Filomena Chow or Gary Wrothman.

You must make provision in the settlement document that the funds go into a special account; you must notify your SA folks in your region; you will have to account for how you are using or why you are not.

## Forms of Special Settlements

- Municipal Solid Waste settlements
  - Where appropriate, consistent with 1989 and 1998 MSW Policies
  - 1998 MSW Policy
    - Sets presumptive terms
      - G/T- per ton presumption
      - O/O- percentage presumption
    - Applicable to MSW and MSS
    - At NPL sites

Before there were the 2002 amendments to deal with MSW, we had an enforcement discretion policy. So there are two ways to settle with the parties where you have a mixed waste landfill.

All this started because of controversy over what per cent MSW should be required to pay at a landfill that also had haz waste and MSW generators were being gouged. This was a way to prevent that from happening.

## Forms of Special Settlements

- *De Minimis* settlements--§ 122(g)
  - For generators with minimal volume and toxicity
  - Emphasis on early settlement with the small parties
  - Premium consistent with reopener
  - Can be either AOC or CD for cashout commensurate with “waste-in”

1986 amendments set forth this method of settling out small contributors

Because there was a hue and cry (you might see a pattern here) over the transaction costs to small parties who had to stay in this major CERCLA litigation and pay bucks to the majors as well as to their own attorney.

Then as now, EPA is encouraged to settle out as soon as possible these small parties in order to keep their costs down and it can actually be very good for EPA as well. Of course you need enough information re waste in to determine the relative shares of generator responsibility. It can be difficult to get that early on.

Benefit to EPA: Use PCB, Inc as an example

1200 PRPs

\$35 million

Steering committee of majors

Both EPA and Steering committee were collecting from the de minimis parties; we did about 5 rounds of settlements in order to get all the possible parties out

Collected \$12 million; put it into a Special account; used that as a settlement incentive for the majors.

## Forms of Special Settlements

- *De Minimis* settlements: SBLRBRA provisions
  - Ability to Pay settlements: must consider ability to PRP to pay costs and “still maintain basic business operation....”
  - PRP settlor must cooperate, provide information and access
  - PRP settlor waives all CERCLA claims against other PRPs
  - EPA must give PRP written reasons for denial of de minimis settlement
  - EPA’s decision not subject to judicial review

2002 amendment Section 122(g)

Amendment actually falls into two categories: 1. those that apply to de minimis PRPs and have an ATP issue; 2. those that apply to all de minimis parties regardless of financial status

See guidance: May 17, 2004 “Interim Guidance on ATP of De Min revisions to CERCLA 122(g)

Amendments specifically authorize EPA to negotiate settlements based on inability or limited ATP; requires ATP applicants to promptly provide EPA with info EPA needs to assess the PRPs ability to pay; directs EPA to consider alternative payment methods

This does not diminish EPAs authority to enter into ATP settlements with other types of parties

EPA generally will: determine PRPs eligibility for de min settlement (burden I on PRP to provide sufficient info to EPA) ; notify PRP of de min eligibility; consider degree of cooperation when making a settlement eligibility determination; impose a waiver of claims requirement on these settlers; impose a continuing obligation of cooperation at the site; notify non-settlers about the settlement.

## Forms of Special Settlements

- *De Micromis* settlements
  - In appropriate circumstances, for those parties who do not meet the exemption in Section 107(o)
  - Guidance issued on 11-07-02: “Revised Settlement Policy and Contribution Waiver Language Regarding Exempt *De Micromis* and Non-Exempt *De Micromis* Parties”
    - Concrete threat of a lawsuit
    - Statutory limits (100 gals or 200 lbs) or slightly more based on site specific factors
    - Model CD and AOC

Again previous to 2002 amendments, guidance and policy dictated our de micromis practice. The amendments did not cover all that the guidance had; so retained the guidance for those situations where de mic is appropriate but not covered by the statute.

As with the statute, this is really a policy of discouragement to those who would otherwise seek to sue these parties.

By its very existence, it is a deterrent to litigation.

Discuss why we did this if Walter has not done so the day before.

## Ability-To-Pay Settlements

- 1997 “General Policy on Superfund Ability to Pay Determinations”
  - Individuals: avoid imposing undue financial hardships
  - Businesses: do not put company out of business and avoid imposing undue financial hardships
- 2001 Amendments to Section 112(g)
  - Authorizes EPA to negotiate settlements based on a PRP's ability to pay rather than on its full liability at the site
  - ATP applicants required to promptly provide information needed to assess the PRP's ability to pay
  - EPA to consider alternative payment methods
- Consider sources of funds: cash on hand, assets, etc.

Codification of previously existing policy.

Lots of guidance; many models , one for almost every scenario you could imagine. On the web site.

### **\*Should actually be 2002 amendments and Section 122\***

Essentially, we generally do not ask in the first 114(e) whether they can pay; first we determine if they are liable; also probably will not ask a fortune 500 company although the fortune 500 of today could be the Enron of tomorrow.

If a company or person says ATP, we ask them to prove it by submitting documentation, tax returns and other stuff.

If they don't we may send a 104(e) to compel but you will find that you weed out a certain number of ATP claims by requiring submission of documentation.

Send to whom ever in your region evaluates these types of documents;

Determines ability to pay. Is this more or less than their share of liability.

Of course this is another instance where you need to know the relative share of liability of the party.

We don't bankrupt people-ask Ken to comment on ASAARCO agreement

If you starting to get the idea that SF cases can be a lot of work with many pressures, you are so right.

## Assistance with Ability-To-Pay

- Computer Models
  - ABEL
  - MUNIPAY
  - INDIPAY
- Regional financial analyst
- For additional assistance: contact Regional Support Division, Office of Site Remediation Enforcement
- Model documents for several forms of settlements



## Settlement: Advantages to EPA

- Response action performed by PRPs
- Reimbursement of past and future federal costs
- Precludes Section 106(b) reimbursement petitions
- Efficiently uses resources to accomplish cleanup; saves fund expenditure
- Avoids litigation costs

Ken

## Settlement: Advantages to PRPs

- Negotiated terms, certainty, repose
- Avoid litigation costs
- Covenant not to sue and contribution protection
- Potential special account disbursement
- Potential orphan share
- Potential for mixed funding
- Dispute resolution provisions

Ken

## Emerging Issues

- Insurance
- Financial assurance
- Enforcement First for RI/FS
- *Cooper v. Aviall*—contribution protection

Ken

# Insurance

- Relevant types of insurance
- Clauses affecting coverage
- Obtaining insurance funds
  - PRP negotiates and/or litigates insurance claim directly with insurer, with some or all of proceeds being used for sure cleanup
  - PRP assigns policy to trust pursuant to CD; trustee hires attorney to pursue insurance. Proceeds shared among trustee, attorney, EPA
  - “Cash-out PRP” assigns policy to “Work PRPs”

Ken

## Financial Assurance

- Types of requirements for financial assurance in settlement documents
- Assuring compliance with this obligation
- Reviewing validity and adequacy of the PRPs' obligation
- Identifying non-compliance
- Taking enforcement action for non-compliance

Ken

## Enforcement First for RI/FS

- Identify some or all PRPs prior to SNLs for RI/FS
- Determine if PRP-lead RI/FS is appropriate
- Adequate documentation of liability, financial and technical capability
- Proceed with settlement negotiations
- Consider using UAO if negotiations fail

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## *Cooper v. Aviall*

- Supreme Court decision holding that plain language of § 113(f)(1) allows a PRP to seek contribution only “during or following” a “civil action” under §§ 106(a) or 107
- Explicitly stated that § 113(f)(3)(b) provides contribution rights for a PRP that resolves its liability to the US or a State in an administrative or judicially approved settlement

Ken

## *Cooper v. Aviall*

- Impacts
  - Stalled negotiations
  - Lower court rulings
  - State voluntary programs and state settlements
- EPA's response strategy
  - *Aviall* response team
  - Public internet page

Ken



## Enforcement Alternatives to Settlement

- Unilateral Administrative Orders (UAOs)
- Litigation to enforce UAO
- Fund-financed response actions and subsequent litigation for cost recovery

So what happens if your negotiations are not successful and you don't get a settlement. Or if the PRP says, we really are not willing to sign this AOC or CD

What are your alternatives.

We will talk about each of these alternatives

## UAOs

- Must have I&SE finding
  - Imminent: conditions for endangerment are present, even if harm not immediate
  - Substantial: reasonable belief of exposure to risk of harm
- Establish link between:
  - Release
  - Possible endangerment
  - Response action required to abate endangerment
- Establish liability of respondents

Do you have a good evidentiary case and good liability v. the PRs

Do you have a sustainable find of I, S & E— not such a difficult standard

Release or threat of a release—release is defined in the statute but what is a threat?

Is the release or threat of release causing the endangerment and can you prove it is the result of liability of the PRPs?

## UAO Practice

- Model UAO for RD/RA
- Presumption: all PRPs should be named in UAO
  - Must justify why any identified PRP is not named in UAO
- Notice to State prior to issuing UAO
- Provide opportunity to confer with EPA
- Respondents must notify EPA of intent to comply

Due Process under 106

Opportunity to confer-being challenged by GE now; will hear more about this on Thursday when Earl Salo talks about defending the agency. Coupled with bar to pre-enforcement review, the effect is that PRP cannot challenge our decision to issue UAO unless we enforce it.

UAO with delayed effective date can be another negotiating tool- they may be calling our bluff-are we bluffing or will we issue the UAO. Also has Avail implications now. Since anyone performing under a UAO does get a right of contribution.

Risks of non-compliance-see next page

Also for RI/FS and at SA sites: special issues in these circumstances:

SA site, PRP won't do the RI/FS- list the site

Evaluate defenses

RI/FS issues: uncooperative?, ability to do work? Liability evidence

## UAOs- Penalties & Damages

- If PRP violates w/o sufficient cause:
  - Penalties of up to \$27,500/day (CERCLA 106(b)), PLUS
  - Treble CERCLA damages (3x cost of response action) (CERCLA 106(c)(3))

It's actually 107 c 3

## Participate & Cooperate UAOs

- Issued against non-settling PRPs
- Requires them to participate & cooperate with parties conducting response work
- Case law affirms authority to issue “Participate and Cooperate” orders (see U.S. v. Occidental)

Get citation

## UAOs- Judicial Review (113(h))

- PRPs can only challenge UAO in:
  - EPA action to impose penalties for UAO violation
  - PRP action for reimbursement after completion of cleanup (CERCLA 106(b)(2))
  - EPA action to enforce UAO
  - Certain EPA cost recovery actions (those seeking declaration of liability for future costs)
- Citizen suit after completion of cleanup

So what is an enforcement action by EPA so that a PRP can challenge our decisions, including the decision to issue the UAO but also remedy decisions

Citizen suit provision is different than that usually offered in other environmental statutes where a citizen suit can be brought after notice to EPA when EPA fails to act. 9659 action alleging that removal or remedial action was in violation of this statute.

## Fund-Financed Response Action

- Followed by cost recovery action provided that there are liable, viable PRPs (covered in module on Cost Recovery)
- Requires referral to DOJ where costs at the site exceed \$500,000

Biggest hurdle at this point is that you must have the money to do the work. Every dollar gets a lot of review

AOA color of money etc.

Priority panel

We'll talk about the cost recovery aspect more when we get to that topic on Thursday.

## Litigation: Injunctive Relief

- To enforce an administrative order issued pursuant to Section 106
- Evidentiary burden
  - Imminent and substantial endangerment
  - Establish link between:
    - Release
    - Possible endangerment
    - Response action required to abate endangerment
    - Use scientific evidence and expert witnesses
  - Establish liability of respondents

This is an enforcement action ; PRPs can challenge agency decisions on almost everything, but hopefully on the record

This is a big burden and not one that is taken lightly by either EPA or DOJ

Also because of all the risks to PRPs who do not perform, we seldom have to do this.



## Litigation: Injunctive Relief (Cont.)

- Requires referral to DOJ
- Request DOJ to file a complaint to enforce UAO and compel performance of a response action
- EPA's selection of response action is subject to judicial review
- Adding a claim for cost recovery

## Limitations on Enforcement

- Section 128
  - Limits EPA enforcement and cost recovery against a party who is conducting or has conducted a cleanup in compliance with a State program at an Eligible Response Site
  - Exceptions:
    - State requests EPA cleanup assistance
    - Contamination across state line or onto federal facility
    - EPA determines I&SE where additional cleanup is necessary
    - New information unknown to state

Ken

## Summary

- Enforcement first- limit impacts on Fund
- Variety of methods for accomplishing cleanup
- Flexibility within settlement options
- Litigate when necessary